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ASSOCIATION OF
AMERICAN RAILROADS

Law Department
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August 10, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board

Washington, DC 20423

Re: Docket No. AB 1043 (Sub-No. 1), Montreal, Maine & Atlantic Railway, Ltd.—Discontinuance of Service and Abandonment—In Aroostoock and Penobscot Counties, ME

Dear Ms. Brown:

Pursuant to the Board's July 23, 2010 Decision in the above proceeding, attached please find the Reply Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB 1043 (Sub-No. 1)

MONTREAL, MAINE & ATLANTIC RAILWAY, LTD—DISCONTINUANCE OF SERVICE AND ABANDONMENT—IN AROOSTOOK AND PENOBSCOT COUNTIES, ME

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), on behalf of its member railroads, files these reply comments in response to the comments filed by the State of Maine and several shippers requesting that the Board impose OFA "forced access" conditions on the applicant. The requested conditions would require the applicant to grant trackage rights and/or haulage to an OFA purchaser to reach other railroads, in the event the subject line is sold under the "financial assistance" provisions of 49 U.S.C. § 10904.

AAR submitted comments on August 3, 2010 which extensively address Board's lack of authority to impose OFA "access" conditions on an abandonment applicant. Accordingly, we will not repeat our prior discussion at length but will briefly respond to the State/shipper comments on this issue. [1]

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[1] As stated in AAR's August 3 Comments, AAR supports the comments of Canadian Pacific Railway on the Board's lack of jurisdiction over the northern terminus of MMA in Canada. Accordingly, AAR will not separately address this issue in this Reply.

A. The Board Has No Authority To Impose OFA Access Conditions Under 49 U.S.C. § 10903(e)

The State/shipper commenters' principal argument seems to be that, regardless of what limitations may be applicable to the Board's authority under§ 10904, the Board has independent authority to impose OFA access conditions under its general authority to impose conditions on abandonments provided in 49 U.S.C. § 10903(e). The existence of this "plenary" conditioning authority, according to the commenters, makes it unnecessary for the Board to address whether § 10904 authorizes access conditions, and gets around the prior Board, ICC and court cases holding that the agency has no authority to impose these kinds of conditions under § 10904.

As discussed at length in AAR's August 3 Comments (pp. 3-12), there is no merit to this argument. In the first place, it ignores the fact that the Board has no general authority to compel a railroad to grant trackage rights to another carrier. Rather, the Board only has this authority where it is expressly conferred by specific provisions of 49 U.S.C. Subtitle IV. The statute does not confer any such authority in connection with abandonment approvals or OFA transactions.

Second, the argument that § 10903(e) authorizes the Board to impose OFA access conditions is contrary to the express language of the statute. § 10903(e) states that the Board's "general" conditioning authority is "subject to this section and to sections 10904 and 10905 of this title."[2] Since the Board's § 10903(e) authority is

[2] § 10905 covers acquisition of rights-of-way for "public use" following abandonment approval.

expressly "subject to" § 10904, § 10903(e) cannot be read as conferring any authority on the Board to impose OFA related conditions beyond what is provided in § 10904. The only authority the Board has as to financial assistance transactions is the authority contained in § 10904.

Third, the Interstate Commerce Commission addressed and rejected the State/Shippers' "general" condition argument long ago. Shortly after the Staggers Act was enacted, the ICC expressly held that it could not use its "general" conditioning authority for matters governed by the OFA provisions of the statute. In Docket No. AB-1 (Sub-No. 111F), *Chicago and North Western Transportation Company—Abandonment in Oneida, Villas, Iron, Ashland and Bayfield Counties, WI and Gogebic County, MI* (served Oct. 9, 1981) Slip op. at 8-9, the Commission rejected a request by an OFA offeror ("ACC") to impose additional sale and subsidy conditions, including acquisition of additional trackage of the abandoning carrier pursuant to the Commission's "general" conditioning powers. The Commission held:

> "49 U.S.C. 10905 [now 10904], as amended by the Staggers Act, prescribes forced sale and abandonment procedures. The new provision contains specific time limitations, standards for determining amounts of compensation and subsidy, and financial responsibility requirements of assistance offerors. Under ACC's interpretation, any and all of the specific requirements of 49 U.S.C 10905 could be circumvented contrary to Congress' intended procedure. Moreover, we note that ACC's interpretation is also foreclosed by the generally accepted rule of statutory construction – a specific statutory provision will govern even though the general provision standing alone might include the same subject [citation omitted]." [3]

[3] The Board has recognized this principle in other contexts as well. For example, in Docket No. 42104, *Entergy Arkansas, Inc, et al. v Union Pacific Railroad Co., et al.* (served June 27, 2009). Slip Op. at 9 -10, The Board held that an interchange commitment could not be challenged as an "unreasonable practice" under 49 U.S.C. § 10702 because there was another statutory provision - § 10705 – which specifically addressed the lawfulness of the conduct in question (an alleged refusal to interchange with another carrier).

Fourth, any claim that § 10903(e) authorizes OFA related conditions ignores a fundamental feature of § 10903(e) conditions. These conditions, regardless of what they may be, only become operative if the applicant *exercises* its abandonment authority. If an applicant does not exercise that authority, any § 10903(e) conditions imposed on the abandonment are of no effect. [4] In an OFA sale, the applicant never exercises its abandonment authority – indeed, under the Board's rules, the application is actually dismissed (see 49 C.F.R. § 1152.27(f)(2)) As such, in an OFA sale, any § 10903(e) conditions imposed on the abandonment authority become inapplicable.

B. The Board Has No Authority To Impose OFA Access Conditions Under 49 U.S.C. § 10904

As discussed in our prior comments, Board, ICC and court precedent firmly establish that the Board has no authority to force a carrier to grant trackage rights or other access over its lines to an OFA purchaser under § 10904 (see AAR August 3 Comments, pp. 8-12). While some of the commenters take issue with these holdings, none of the commenters has presented anything which would suggest that they are

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[4] Interestingly, Louisiana-Pacific (LP) recognizes this in its comments. LP states that, under the access conditions it is seeking, the Board would not be "affirmatively ordering" MMA to grant trackage rights, "but rather would be telling MMA that it will have to grant such rights *voluntarily* if it wants to proceed with its proposed abandonment ..." (LP Comments at p. 6, fn 3, emphasis in original). What LP fails to recognize is that, if there is an OFA sale, MMA will not "proceed with its proposed abandonment". As such, any § 10903(e) conditions imposed on the abandonment would never become operative.

erroneous.[5] Clearly, had Congress intended to give the Board authority to grant trackage rights or other access terms in connection with an OFA sale under § 10904, they would have expressly conferred that authority, as they did in connection with feeder line sales under 49 U.S.C. § 10907, and as they did in other provisions of the Act.[6]

C. The Hypothetical Rate and Service Concerns Raised in the State/Shipper Comments Do Not Justify Imposition of OFA Access Conditions

Finally, the State/Shipper commenters claim that forced OFA access conditions are necessary due to potential rate and service problems an OFA purchaser might otherwise encounter with MMA interline services. As the AAR previously discussed (AAR August 3 Comments, pp. 16-17), these problems are all hypothetical and offer no

[5] At pp 3-4 of its comments, Twin Rivers Paper Company argues that a 1997 decision in Docket No. AB-33 (Sub-No. 113), *Union Pacific R. Co. – Discontinuance of Service and Abandonment – In Natrona (etc) Counties, WY* (served November 12, 1997 ("UP-Natrona") show that "its [the Board's] interpretation of its authority under § 10904 is not as settled as the applicant suggests." But UP-Natrona has nothing to do with the present case. The issue the Board raised (but did not decide) in UP-Natrona was whether EXISTING trackage rights which were part of a line proposed for abandonment could be transferred to an OFA purchaser. There's nothing in the decision suggesting that the Board might have authority under § 10904 to force the applicant to make a NEW grant of trackage rights over its remaining lines for the benefit of an OFA purchaser.

[6] For example, Huber Engineered Woods argues that the fact that § 10907 allows the Board to grant limited trackage rights while 10904 has no such authorization is not significant because these are "independent statutory sections" (Huber Comments, p. 6). They are not "independent". They are part of the same regulatory statute, they were both originally enacted as part of the abandonment amendments of the 1980 Staggers Rail Act. The fact that the standards for obtaining relief under § 10907 differ depending on a line's status on the system diagram map required by § 10903 (see § 10907(b)(1)(A)(i) and (ii)) show how closely related these provisions are. The conclusion is inescapable that Congress, when enacting the package of Staggers Act abandonment reforms which included what are now §§ 10903, 10904 and 10907, intended to give the ICC authority to grant limited trackage rights in §10907 transactions, and did not intend to give the agency similar authority in § 10904 transactions.

basis for any Board action.[7] The State/Shipper Comments, when taken as a whole, are really asking the Board to transform abandonment/discontinuance proceedings into broad "forced access" proceedings, where various interests can seek to have the Board require a railroad to grant other railroads access over large parts of its system as the price for seeking an abandonment of an unprofitable line. As discussed above, the Board has no authority to do this. Further, the statute provides specific remedies for all of the rate and service issues raised by the commenters, including rate levels, divisions [illegible] requirements and service issues (AAR August 3 Comments, p. 17). The Board should decline the State/Shipper Commenters' invitation to use its abandonment authority as an end run around the specific provisions of the statute dealing with these issues.

Conclusion

The Board does not have the authority under the provisions of 49 U.S.C. § 10903 and 49 U.S.C. § 10904 to impose mandatory trackage rights or mandatory haulage rights as a condition of an abandonment/OFA approval. Further, the Board's jurisdiction under

[7] Moreover, there is an implicit assumption in the commenters' arguments that an abandoning railroad would deliberately try to discourage traffic moving to or from the OFA lines. As the AAR previously pointed out, there is no intuitive reason why any railroad would do this. An OFA operator is normally not a competitor to the abandoning railroad. Rather, it is a source of interline traffic to the abandoning road. As such, the abandoning road would have a natural incentive to encourage and handle this traffic, if it can do so profitably.

49 U.S.C. 10501 (a) (2) extends only to "transportation in the United States" and the Board does not have jurisdiction over the northern terminus of the MMA in Canada for which mandatory access rights are sought.

Respectfully Submitted,

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